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In The

Supreme Court of the United States

Spring Session, 1970

No. 1236

ELAM REAMUEL TEMPLE

Petitioner

Vs:

THE NORTH CAROLINA STATE BAR

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

JOHN W. HINSDALE
808 Lawyers Building
Raleigh, North Carolina
Attorney at law for Petitioner

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THE NORTH CAROLINA STATE BAR

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

To: The Honorable Warren Earl Burger, Chief and to the Honorable Associate Justices of the Supreme Court of the United States of America.

Petitioner, Elam Reamuel Temple, respectfully prays for a writ of certiorari to the Supreme Court of North Carolina and the North Carolina Court of Appeals to review the final judgments entered on August 14, 1968, November 13, 1968, January 21, 1969, October 22, 1969, December 2, 1969.

OPINIONS BELOW

Petitioner was denied due process of law on the grounds of his assignment of errors set forth in the record proper and was denied a new trial on the grounds of newly discovered evidence by the Superior Court of Johnston County, North Carolina; the North Carolina Court of Appeals and the Supreme Court of North Carolina. The judgments and opinions of the Superior Court, the North Carolina Court of Appeals and the Supreme

Court of North Carolina are contained in the Appendix. Reported in 2 N.C. App. 91.

JURISDICTION

The jurisdiction of the Court is invoked under Act of Congress of June 25, 1948, 28 U.S.C.A. 1257 (3)

SUMMARY STATEMENT

Petitioner was charged with professional misconduct in the Superior Court of Johnston County, North Carolina September 1966. As a first cause of action the North Carolina State Bar, hereinafter referred to as complainant, alleged that on or about July 18, 1963 petitioner attempted to engage in the illegal traffic of counterfeit money by offering to sell to a Federal Revenue Agent counterfeit Federal Reserve Notes, that no evidence as to the counterfeit Federal Reserve Notes was offered at the trial of the cause; as a second alleged cause of action petitioner was accused of preparing or caused to be prepared certain affidavits in re estate and last will and testament of Nancy Williams; that as an alleged third cause of action petitioner was accused of altering a promissory note and deed of trust from two hundred ($200.00) dollars to twenty two hundred ($2200.00) Dollars. Petitioner was tried pursuant to N.C.G.S. 84-28 (d) (f) which is set forth in the appendix. Petitioner filed an answer, demurrer, motions to strike, plea in bar, plea of statute of limitations as will appear of record. The demurrer, plea in bar, plea of statute of limitations and motions were denied and made the subject of appeal to the North Carolina Court of Appeals and the North Carolina Supreme Court. In October 1967 the matter was tried in the Superior Court of Johnston County, North Carolina and from a jury verdict against petitioner he appealed entering some forty seven assignment of errors.

The constitutional questions presented in this petition were raised in the North Carolina Court of Appeals and the Supreme Court of North Carolina.

The North Carolina Court of Appeals affirmed the lower Court decision August 14, 1968 . . . (2 N.C. App. 91). October 19, 1968 petitioner petitioned the N.C. Court of Appeals for a rehearing which was granted and the N.C. Court of Appeals sustained its original decision on November 13, 1968. On December 3, 1968 notice of appeal was filed with the N.C. Supreme Court and the appeal was denied January 21, 1969. On February 27, 1969 petitioner filed a motion for a new trial on the grounds of newly discovered evidence in the Superior Court of Johnston County, N.C. This motion was heard and denied May 5, 1969. Petitioner appealed and the appeal was dismissed by the N.C. Court of Appeals October 22, 1969. Petitioner petitioned the N.C. Supreme Court for Writ of Certiorari which was denied December 2, 1969. Notices of petition for Writ of Certiorari to the United States Supreme Court were filed with the N.C. Supreme Court on December 12, and December 27, 1969.

The Federal Questions sought to be reviewed are, to wit:

RAISING OF THE FEDERAL QUESTIONS

(1) That petitioner was deprived of his constitutional rights by the delay in the bringing of the action in violation of United States Constitution Amendment XIV Sec 1, portion thereof as follows: "Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny any person within its jurisdiction the equal protection of the law." And Amendment V U.S. Constitution provides "nor be deprived of life, liberty, or property without due process of law." Assignments of errors Nos. 1 & 2 of the trial Court.

(2) That petitioner was deprived of his constitutional rights (assignment of errors Nos. 17 & 24 of the trial record) which were directed to the error of the Court in granting the motion of the U.S. Government to quash the subpoenas of U.S. Government Secret Service Agents Spicer and Tarlton to appear and testify for the petitioner in violation of Amendment VI of the U.S. Constitution the portion thereof which reads: "In all

criminal prosecutions the accused shall have the right to a speedy and public trial, to have compulsory process for obtaining witnesses in his favor."

(3) That petitioner was deprived of his constitutional rights by the denying of his motion for a new trial on the grounds of newly discovered evidence in violation of Amendment VI U.S. Constitution portion thereof "to have compulsory process for obtaining witnessess in his favor" and Amendment XIV Sec 1 U.S. Constitution portion thereof "Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the law." and Amendment V U.S. Constitution portion thereof which reads: "nor be deprived of life, liberty or property without due process of law."

The constitutional questions were raised in the trial Court, the N.C. Court of Appeals and the Supreme Court of North Carolina. The Court of Appeals for North Carolina and the North Carolina Supreme Court did not expressly pass upon the constitutional questions and neither did they discuss in a judicial manner the various other objections and exceptions interposed by petitioner in this cause.

QUESTIONS PRESENTED

(1) Was the petitioner deprived of his constitutional rights by the delay in the bringing of the action by complainant?

(2) Did the trial Court err by preventing petitioner from presenting his evidence at the trial of the cause in October 1967?

(3) Was the petitioner deprived of his constitutional rights by the denial of his motion for a new trial on the grounds of newly discovered evidence?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The instant case is within the statutory provisions relied

on to confer jurisdiction on this Court. That the following authorities sustain his contention that the Court has jurisdiction of and should take cognizance of the instant case as being within the provisions of 28 U.S.C.A. 1257 (3); Wilson vs Cook 327 U.S. 474, 66 S. Ct. 663, 90 L.Ed. 793 in which the Court said (66 S Ct 663 at 666) "This jurisdictional requirement is satisfied only if the record shows that the question of validity under Federal Law of the state statute, as construed and applied, has either been presented for decision to the highest court of the State or has in fact been decided by it and that its decision was necessary to the judgment." In Honeyman vs. Hanan 300 U.S. 14, 57 Sup Ct 350, 81 L Ed 476 the Court stated: "it must appear that its decision was necessary to the determination of the cause and that it was actually decided, or that the judgment rendered could not have been given without deciding it." See also Williams vs. Kaiser 329 U.S. 471. In the case of Louisiana Vs. Reswehler 329 U.S. at page 468 Justice Frankfurter stated: "insofar as due process under the Fourteenth amendment requires the State to observe any of the immunities, that are valid as against the Federal Government by force of specific pledges in the concept of ordained liberty and thus through the Fourteenth Amendment becomes valid as against the state." "In short the due process clause of the Fourteenth amendment did not withdraw the freedom of a state to enforce its own notions of fairness in the administration of justice, unless, as it was put for the Court by Mr. Justice CORDOZO, 'in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental.'"

QUESTION NUMBER ONE

In the instant case it is contended that the question of unreasonable delay (statute of limitations) was properly raised and presented to the trial tribunal, the North Carolina Court of Appeals and the Supreme Court of North Carolina. Petitioner argues that his demurrer should have been sustained. The complaint on its face as to the first cause of action is alleged to

have happened on July 18, 1963 and that summons was not issued until September 8, 1966, more than three (3) years after the alleged event.

In the case of DOCKERY VS. TOWN OF HAMLET 162 N.C. 118 the Court stated: "time is an essential part of the cause of action and this should appear in the complaint and a general denial in the answer is sufficient and if this does not appear in the complaint it is grounds for demurrer for failure to state a cause of action." That N.C.G.S. 1-52 (2) provides "upon a liability created by statute, other than a penalty or forfeiture, unless some other time is mentioned in the statute creating it, it is barred in three years." That N.C.G.S. 1-54 (1) provides: "(1) Against a public officer, for a trespass under color of his office, (2) upon a statute for a penalty or forfeiture, where the action is given to the State alone, or in whole or in part to the party aggrieved, or to a common informer, except where the statute imposing it prescribes a different limitation is barred in one year." Other than these statutes the N.C. Legislature has never enacted any statute which would have any application to the instant case and therefore petitioner argues that the general statute of limitations applies.

In LIMITATIONS OF ACTIONS 45 A.L.R. 1110 Sec 69 68 Ill. 151 People Ex Rel Vs. Allison (1873) it is stated: "It has been said generally with respect to disbarment proceedings that in analogy to our statutes which bar prosecution for misdemeanors there ought to be a limit to the time in which information could be filed." "It seems however that except in the few states which have enacted specific statutes on the subject there is no limitation on the time for institution of disbarment proceedings except the inherent power of the Court to refuse to hear an application to disbar which has been unreasonably delayed." In the case of PEOPLE VS. HOOPER (1905) 218 Ill. 313 the Court stated: "The Court will consider any unexplained, unreasonable delay in presenting the charges and also whether by reason of such delay the accused has been deprived of a fair opportunity of securing proof to meet the ac-

cusations." In the case of STATE OF NEBRASKA STATE BAR Vs. BATES 77 N.W.2d 302 the Court stated: "Laches is an equitable doctrine and does not result from mere passage of time. The objection of laches is not tenable to defeat a cause if there has been no material change in position of, or prejudice by delay to the objector." See also Ex Parte Dozier (Ala) 77 So.2d 903, 1953) and In Re Evans 72 Okla. 216, 179 P.922.

Petitioner argues that the unreasonable delay in the bringing of the action violated the spirit and meaning of AMENDMENT XIV Sec I U.S. Constitution and AMENDMENT V of U.S. Constitution. That there occurred considerable changes in the circumstances surrounding the alleged event. That U.S. Marshall White was killed in a car accident and that Secret Service Agent L. T. Huff reportedly died about a year before the trial of the cause. That another witness, Bodrick, was killed by a State Patrolman before the trial of the cause and the Clerk of Court died of cancer. All of these witnesses were material to the alleged events.

The legislatures of the various states which have enacted statutes bearing on the time limit within which prosecution may be commenced in disbarment proceeding ranges in time from one to three years.

For the reasons stated herein petitioner contends that his demurrer should have been sustained, and that certiorari should be granted.

QUESTION NUMBER TWO

Petitioner's argument number two is directed to the error of the Court in preventing him from presenting his evidence at the trial of the cause in October 1968. Assignment of errors Numbers 17 & 24 were directed to the error of the Court in granting the motion of the U.S. Government to quash the subpoenaes of Secret Service Agents Vernon Spicer and C. M. Tarlton to appear and testify on behalf of petitioner. It was shown that the subpoenaes were duly served on each of said witnesses and that they were present in Court for the purpose

of being witnesses for petitioner when the U.S. Attorney appeared and made a motion to quash the subpoenaes which was granted by the Court under authority of a letter issued by the then U.S. Attorney General which is set forth in the Appendix. Petitioner argues that the letter issued by the Attorney General of the United States was not applicable in the present case and that same was and is unconstitutional. The record presents that the alleged acts of misconduct of dealing in counterfeit money were associated with Agents of the United States Secret Service and in no way was connected with agents of the United States Department of Justice. Petitioner challenges the validity of the issue of the order of the Attorney General of the United States which makes the head of a department rather than a Court the determinator of the admissibility of evidence.

The leading case on the subject under consideration appears to be TOUHY VS. RAGEN 340 U.S. 462 (1950). In that case Justice Frankfurter speaking for the Court stated: "Specifically, the decision and opinion in this case cannot afford a basis for a future suggestion that the Attorney General can forbid every subordinate who is capable of being served by process from producing relevant documents and later contest a requirement upon him to produce on the ground that procedurally he cannot be reached. In joining the Court's opinion I assume the contrary . . . that the Attorney General of the United States can be reached by process. Though he may be reached what disclosure he may be compelled to make is another matter. But unless the Attorney General's amenability to process is impliedly recognized we should candidly face the issue of immunity pertaining to the information which is here sought. To hold now that the Attorney General is empowered to forbid his subordinates, though within a court's jurisdiction, to produce documents and to hold later that the Attorney General cannot in any event be procedurally reached would be to apply a fox hunting theory of justice that ought to make Bentham's skeleton rattle."

Further in the case of McFadden Vs. Avco Corp. 278 F Supp 57, U.S. Dist. Court., M.D. Ala. July 1967 Dist. Judge PITTMAN stated: "Reliance was made on the Touhy Case, two years later however, the decision of the Court in Reynolds Vs. U.S. 345 U.S. 1, 73 S.Ct. 528, 97 L Ed 727 (1953) seemed to cast doubt upon the Touhy holding. There unlike the earlier case, the Justice felt compelled to consider the merit of the alleged privilege. They made clear that in determining whether to compel disclosure of an accident report which the Secretary of the Air Force had ordered withheld the question of whether a valid privilege was being raised was for the District Court and not for the Secretary of the Air Force. Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. (73 S. Ct at 533). Disclosure was not ordered in that case because the Court was satisfied that military secrets were at stake and thus a valid claim of privilege existed."

The Fifth Circuit in the case of N.L.R.B. Vs. Capital Fish Co. 294 F 2d 868 (Fifth Circuit 1961) recognized that a valid privilege was the only justification for failure to disclose government records and observed that the functions of a housekeeping statute was to give the head of the Agency or other party the opportunity to decide whether to assert the privilege, not to create a privilege per se. There a trial examiner quashed a subpoena issued to an N.L.R.B. investigator because the Board's General Counsel had refused to let him testify. The Court rejected the idea that the General Counsel should have been served noting that this would impose an additional and unnecessary burden on parties seeking to obtain Government records . . . without the slightest compensating improvement in the disposition of justice. Commenting on the Reynolds case as it modified the Touhy case the Court stated: "When a party has filed a request for evidence of testimony and the request can be properly denied only if the evidence or testimony is privileged, the question of privilege is squarely raised by an unexplained refusal to comply as by an express claim of privilege and the Courts must decide the question."

In the present case the Attorney General of the United States had no legal status in appearing to quash the subpoenas of witnesses Secret Service Agents Vernon Spicer and Secret Service Agent Tarlton for that their functions were under the jurisdiction and directions of a Department of the Government other than the United States Department of Justice to wit: THE Secretary of the Treasury of the United States. That the authority which the trial Court used for the granting of the motion to quash had no application at all to Secret Service Agents of the Treasury Department of the Government.

Conceding for the purpose of argument, but not admitting, that the letter of the Attorney General of the United States was applicable in the present case it is submitted that the trial Court made no inquiry and made no findings of facts that the appearance and testimony of the Secret Service Agents would involve privileged testimony, national security of secrets of the Government or otherwise violate the rights of the Secretary of the Treasury, or the United States Department of Justice. Petitioner argues that the denial of the testimony of Secret Service Agents Spicer and Tarlton violated the spirit and meaning of the due process clause of AMENDMENT XIV Sec. 1 of the United States Constitution, AMENDMENT V of the United States Constitution and AMENDMENT VI of the United States Constitution. That for the reasons stated herein certiorari should be granted.

QUESTION NUMBER THREE

Question number three is directed to the error of the Court in denying his motion for a new trial on the grounds of newly discovered evidence.

The case of STATE VS. CASEY 201 N.C. 620 appears to be in line with the Federal cases dealing with the granting of new trials on the grounds of newly discovered evidence. In that case the Court stated and set forth certain prerequisites to the granting of a new trial on the grounds of newly discovered evidence as follows:

(1) That the witnesses will give the newly discovered evidence.

(2) That the newly discovered evidence is probably true.

(3) That it is competent, material and relevant.

(4) That due diligence was used and proper means were employed to procure the testimony at the trial.

(5) That the newly discovered evidence is not merely cumulative.

(6) That it does not tend only to contradict a former witness or to impeach or discredit him.

(7) That a different result will probably be reached and that right will prevail.

The only argument which the complainant presents that these pre-requisites had not been complied with appears on page nine (9) of their brief in the Court of Appeals for North Carolina as follows: "The affidavits attached to the respondent's motion for a new trial shows themselves to be either merely cumulative or contradictory and his failure to show that due diligence was used to procure the testimony at the trial." The facts and the record does not sustain this argument. How could the evidence contained in the affidavits of Rev. Frank A. Armstrong, Dan (-) Perry and Roland Smith be cumulative or contradictory when no other person testified at the original trial to the contrary. May it be observed by the Court that the trial Court made the inaccurate findings of facts that all of the witnesses had been subpoened and were in Court. The subpoeneas does not sustain this finding of fact, but does show that they were issued and placed in the hands of the law for service which presents due diligence on the part of petitioner. The subpoena of L. T. Huff has the return entered thereon "that he had been dead about a year." In petitioner's motion for a new trial on grounds of newly discovered evidence he alleges that this return is false and con-

stitutes a fraud which has not been controverted by the complainant. Petitioner argues that the Court within its discretion should have granted a new trial on the grounds of newly discovered evidence.

Petitioner recognizes the principle of law set forth in DAVIS VS. YELLOW CAB Co. 220 F 2d 790 "In state and Federal Courts alike, new trials on the grounds of newly discovered evidence may not be granted unless facts discovered will probably change results and not be merely cumulative or impeaching." Further, as the Court stated in MACHINERY CORP. VS. ADAMS MFG CO. 135 F 2d 617 "to secure a re-hearing on newly discovered evidence it must appear that party exercised due diligence at all times in effort to secure such evidence and that such evidence is of such weight as to necessitate a different conclusion.

Petitioner asserts that the returns on the subpoena of L. T. Huff, United States Secret Service Agent is a fraud and that this within itself warrants the issuance of a writ of certiorari, and the relief sought.

That he recognizes and directs the Court's attention to the principle of law set forth in the case of ROCHIN VS. PEOPLE OF CALIFORNIA 342 U.S. 165 wherein the Court stated: "Due process of law is a summarized constitutional guarantee of respect for those personal immunities which are so rooted in the traditions and conscience of our people as to be ranked fundamental or are implicit in the concept of ordered liberty." Also in the case of U.S. Ex Rel Montgomery Vs. Ragen D.C. Ill. 1946, 86 F Supp 382 the Court stated: "Due process of law identifies itself with due course of justice and means not only the due conviction and punishment or the due acquittal and discharge of an accused person as justice may require but it also means the due course of proceedings in the administration of justice."

Petitioner argues that to deny him a new trial on the grounds of newly discovered evidence would violate the spirit and

meaning of the due process of law clauses of Admendment XIV Sec I of the United States Constitution, Amendment V and Amendment VI of the U.S. Constitution as heretofore set forth herein.

In the trial of this cause complainant introduced into evifence a considerable amount of evidence that he had cheated and defrauded witness Tart out of a considerable sum of money. That there were no charges of this in the original complaint and petitioner was not in position to rebut this accusation. That after the trial he located a general release signed by witness Tart as will be seen by his affidavit presented in the record proper. Can it be said that such procedure constitutes a constitutional respect for those personal rights which are ranked as fundamental in the concept of ordered liberty.

Petitioner argues that if the Secret Service Agent L. T. Huff is dead as indicated on the subponea then why don't the Officials of the U.S. Treasury Department and/or the United States Department of Justice advise the Court and the petitioner when he died, where he died and where he was buried. That since this witness testified September 1964 in the Federal Court In Re contempt of Court proceedings against the petitioner his presence and whereabouts will not be told by the Government. Can it be said that this kind of procedure is in accordance with the spirit and meaning of the due process clauses of the United States Constitution and Amendment VI requiring the compulsory attendance of witnesses on behalf of the accused?

Petitioner argues that he is entitled to the appearance & testimony of Agent L. T. Huff, Agent Vernon Spicer and Agent Tarlton. That it is not within the meaning and spirit of the various clauses of the U.S. Constitution presented herewith that a lawyer's license be revoked without administering a reasonable opportunity for him to present his evidence. To permit otherwise is the eradication of ordered liberty and the sustaining of judicial hypocrisy.

Petitioner argues that the State Courts have decided federal questions in this cause of substantial substance in a way not in accord with the applicable decisions of this Court. That the North Carolina Court of Appeals and the North Carolina Supreme Court and the trial Court have so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision and direction.

Applying the principles of law set forth herein to the facts and circumstances of the instant case petitioner submits that a Writ of Certiorari is in order.

WHEREFORE: Petitioner prays that a Writ of Certiorari be issued to the Supreme Court of North Carolina, the North Carolina Court of Appeals and that the opinions and judgments of Johnston County Superior Court, the North Carolina Court of Appeals and the N.C. Supreme Court be reviewed and reversed.

Respectfully submitted

Dated at Raleigh, North Carolina

February 15, 1970

John W. Hinsdale
Attorney at law for Petitioner
808 Lawyers Building
Raleigh, North Carolina

APPENDIX

JUDGMENT OF THE TRIAL COURT, MARTIN, J., OCTOBER 20, 1967

This cause coming on to be heard and being heard before his Honor, Robert M. Martin, Judge presiding, and a jury at the October 16th Civil Term of the Superior Court of Johnston County, and the jury having answered the issues submitted to them as follows:

1. Did the respondent, Elam Remuel Temple, on or about July 18, 1963, attempt to engage in the illegal traffic of counterfeit money, as alleged in the complaint?

Answer: Yes

2. Did the respondent, Elam Remuel Temple, on or about November 16, 1964, wilfully and fraudulently prepare or cause to be prepared false affidavits in connection with the purported or duplicate original Last Will and Testament of Nancy Williams, which the respondent knew to be false and erroneous, as alleged in the complaint?

Answer: Yes

3. Did the respondent, Elam Remuel Temple, wilfully and fraudulently procure or cause to be procured the signature of one Thomas Jones as a witness to a paper writing purporting to be a duplicate original Last Will and Testament of Nancy Williams subsequent to her death, as alleged in the complaint?

Answer: Yes

4. On or about November 16, 1964, did the respondent, Elam Remuel Temple, wilfully and fraudulently offer or cause to be offered false and erroneous affidavits to the clerk of the Superior Court of Johnston County in connection with the probate of the purported duplicate

original Last Will and Testament of Nancy Williams, as alleged in the complaint?

Answer: Yes

5. Did the respondent, Elam Remuel Temple, wilfully and fraudulently alter a note and deed of trust from one Nancy Williams to Dan Perry, Trustee, for the benefit of Elam Remuel Temple by wilfully and fraudulently changing the amount from $200.00 to $2200.00 without the knowledge and consent of Nancy Williams, as alleged in the complaint?

Answer: Yes

6. Did the respondent, Elam Remuel Temple, wilfully and fraudulently offer or cause to be offered to the clerk of the Superior Court of Johnston County a fraudulently altered note and deed of trust for recordation as shown in Book 629, page 19, in the office of the Register of Deeds of Johnston County, as alleged in the complaint?

Answer: Yes

The jury having answered each of the issues in the affirmative;

THEREFORE, it is ordered and adjudged that the respondent, Elam Remuel Temple be and he is hereby disbarred from the practice of law in the State of North Carolina.

FURTHERMORE, it is hereby ORDERED, ADJUDGED and DECREED that the respondent be taxed with the costs of court.

It is further ORDERED, ADJUDGED AND DECREED that a certified copy of this judgment be transmitted to the clerk of Supreme Court of North Carolina and to the clerk of the Court of Appeals of North Carolina; that a certified copy of this judgment be transmitted to the clerk of Superior Court of Johnston County and a certified copy of this judg-

ment be transmitted to the office of the North Carolina State Bar.

This, the 20th day of October, 1967.

ROBERT M. MARTIN
Judge Presiding

To the signing of the foregoing judgment respondent excepts and gives notice of appeal to the Court of Appeals of North Carolina. Further notice waived. This 20th day of Oct. 1967.

s/ ROBERT M. MARTIN

OPINION OF NORTH CAROLINA COURT OF APPEALS No. 68SC93, Spring Session 1968, Filed 8-14-68.

Appeal by respondent from MARTIN, S. J. October 1967 Session Johnston Superior Court.

Complainant instituted this action pursuant to Chapter 84 of the General Statutes. The complaint is briefly summarized as follows: (Numbers ours)

(1) Respondent is and was at all times referred to in the complaint an attorney at law licensed to practice in North Carolina and is and was subject to the rules and regulations of complainant and the laws of North Carolina.

(2) While acting as an attorney and as an individual, respondent did unlawfully and wilfully (a) engage in conduct involving willful deceit and fraud. (b) engage in activity showing professional unfitness, and (c) did practice chicanery and fraud upon the courts of this State.

(3) AS A FIRST CAUSE OF ACTION: On or about 18 July 1963, respondent attempted to engage in illegal traffic of counterfiet money.

(4) AS A SECOND CAUSE OF ACTION: In Novem-

ber, 1964, respondent prepared or caused to be prepared certain affidavits and engaged in other activities in connection with the estate of one Nancy Williams, all of which were false, erroneous or untrue.

(5) AS A THIRD CAUSE OF ACTION: In the summer of 1964, respondent altered a promissory note and deed of trust which Nancy Williams had executed in his favor in January, 1964, by increasing the amount of said note and deed of trust from Two Hundred Dollars to Twenty-two Hundred Dollars, without the knowledge and consent of the said Nancy Williams, and caused said altered deed of trust to be recorded in the Jonston County Registry.

Respondent filed answer denying the material allegations of the complaint and requested a trial by jury. Thereafter, on 13 January 1967, he filed a demurrer and motion to dismiss which was heard and denied by Clark, J., on 23 January 1967. On 28 January 1967, respondent filed a motion to strike and a plea in bar and plea of statute of limitations; by order dated 27 February 1967, Mallard, J., denied the motion to strike.

Issues were submitted to and answered by the jury as follows:

"1. Did the respondent, Elam Reamuel Temple on or about July 18, 1963, attempt to engage in the illegal traffic of counterfeit money, as alleged in the complaint?

Answer: Yes.

"2. Did the respondent, Elam Reamuel Temple, on or about November 16, 1964, willfully and fradulently prepare or cause to be prepared false affidavits in connection with the purported or duplicate original Last Will and Testament of Nancy Williams, which the respondent knew to be false and erroneous, as alleged in the complaint?

Answer: Yes.

"3. Did the respondent, Elam Reamuel Temple, willfully and fraudulently procure or cause to be procured the signature of one Thomas Jones as a witness to a paper writing purporting to be a duplicate original Last Will and Testament of Nancy Williams subsequent to her death, as alleged in the complaint?

Answer: Yes.

"4. On or about November 16, 1964, did the respondent, Elam Reamuel Temple, willfully and fraudulently offer or cause to be offered false and erroneous affidavits to the clerk of the Superior Court of Johnston County in connection with the probate of the purported duplicate original Last Will and Testament of Nancy Williams, as alleged in the complaint?

Answer: Yes.

"5. Did the respondent, Elam Reamuel Temple, willfully and fraudulently alter a note and deed of trust from one Nancy Williams to Dan Perry, Trustee, for the benefit of Elam Reamuel Temple, by willfully and fraudulently changing the amount from $200.00 to $2200.00 without the knowledge and consent of Nancy Williams, as alleged in the complaint?

Answer: Yes.

"6. Did the respondent, Elam Reamuel Temple, willfully and fraudulently offer or cause to be offered to the Clerk of the Superior Court of Johnston County a fradulently altered note and deed of trust for recordation as shown in Book 629, page 19, in the Office of the Register of Deeds of Johnston County, as alleged in the complaint?

Answer: Yes.

From judgment entered on the verdict disbarring respondent from the practice of law in the State of North Carolina and taxing him with the costs of court, respondent appealed.

ROBERT B. MORGAN AND B. E. JAMES, ATTORNEYS FOR COMPLAINANT APPELLEE.

ELAM REAMUEL TEMPLE, ATTORNEY PRO SE.

BRITT, J. G.S. 84-28 deals with discipline and disbarment of attorneys. It authorizes the council of the North Carolina State Bar or any committee of its members appointed for that purpose, or designated by the Supreme Court, to have jurisdiction to hear and determine complaints, charges of malpractice, corrupt or unprofessional conduct, or other allegations made against any member of the North Carolina State Bar. Subsection (3) provides that the processes of the courts may be invoked to carry out the purposes of Chapter 84 but provides that the person charged may demand a trial by jury.

In his appeal to this court, respondent made numerous assignments of error to the trial proceedings. We will discuss those we deem pertinent to the appeal.

He contends that the trial court committed error in overruling his demurrer and motion to dismiss, his motion to strike, and his plea of the statute of limitations.

It is well established that upon demurrer a pleading will be liberally construed with a view to substantial justice between the parties, giving the pleader the benefit of every reasonable intendment in his favor. A demurrer will not be sustained unless the pleading is wholly insufficient or fatally defective. A demurrer admits, for the purpose of testing the sufficiency of the pleading, the truth of factual averments well stated, and relevant inferences of fact reasonably deducible thereform. 6 Strong, N. C. Index 2d, Pleadings, Sec. 19, p 325, citing numerous authorities. The allegations in the complaint in this action were amply sufficient to survive demurrer.

Respondent's demurrer and motion to dismiss were based on the contention that the facts as alleged do not constitute a cause of action. In BOWLING v BURTON, 101 NC 176, 7 SE 701, our Supreme Court held that a defective statement of a

cause of action is ground for demurrer but not for a motion to dismiss the action. Respondent was not entitled to have his motion to dismiss granted.

Respondent's motion to strike, denied before the action came on for trial, was made after answer was filed. Granting or denial of the motion then became a matter of discretion for the court, and Judge Mallard properly exercised his discretion in denying the motion. BROWN v BALL, 226 NC 732, 40 SE 2d 412. Furthermore, we find that the motion to strike was without merit, and respondent's assignment of error relating thereto is overruled.

The plea of the statute of limitations is not available to respondent in this action. In 7 Am Jur 2d, Attorneys, Sec. 62, p 86; Annotation, 45 A.L.R. 1110, it is said:

> "Disciplinary proceedings are not barred by the general statute of limitations. Nor is a disciplinary proceeding barred because it is grounded on acts that also constitute a crime that cannot be prosecuted in a criminal action because of limitations."

Respondent contends that the trial court erred in permitting certain witnesses to testify as to transactions and conversations between the respondent and third parties who were deceased at the time of the trial, contending that the evidence was violative of GS 8-51. We hold that said testimony was not violative of the statute and that the assignments of error relating thereto are without merit.

Assignments of error were also made to the trial court's granting the motion of the U. S. Government to quash the subpoenas of respondent directed to U. S. Secret Service Agents Spicer and Tarlton. Certain rules and regulations are prescribed by the Federal Government for the summoning of Secret Service Agents; the record discloses that respondent failed to comply with the regulations, therefore, we hold that his assignments of error relating thereto are without merit.

Respondent assigns as error the failure of the trial court to

grant his motion for judgment as of nonsuit made at the close of complainant's evidence and renewed at the conclusion of all the evidence. We hold that the evidence was more than sufficent to support complainant's complaint and to withstand motions for nonsuit.

On its first cause of action, complainant introduced evidence showing that respondent approached one Jesse Noah Williams and tried to get him to work with respondent in purchasing counterfeit money. Pursuant to his conversation with Williams, the evidence disclosed that respondent met with Secret Service Agent Huff, posing as Williams' brother-in-law, and attempted to consummate a transaction involving counterfeit money. The testimony also showed that in June or July of 1963, respondent contacted one Ralph C. Winstead, a convicted counterfeiter, and attempted to purchase counterfeit money from him.

On its second cause of action, complainant introduced several witnesses who gave detailed testimony in support of each allegation of the second cause of action.

As to the third cause of action, complainant presented testimony of one Moses Tart who testified that he saw respondent alter the note and deed of trust executed by Nancy Williams by changing the amount of the indebtedness stated on the note and deed of trust from $200.00 to $2200.00, and that respondent told Tart at the time that no one would know the difference. The deed of trust was thereafter recorded in the Johnston County Registry.

We have stated only a small portion of the voluminous testimony presented by the complainant. The trial court very properly overruled the motions to nonsuit.

Respondent noted 43 exceptions to the trial court's charge; in fact, he excepted to most of the charge and then by exception No. 70, "(d)efendant objects and excepts to the charge of the court as a whole." Although respondent's numerous exceptions to the charge probably amount to a broadside excep-

tion, we have given careful consideration to the charge and each objection made by the respondent. We do not deem it necessary to discuss the numerous exceptions and assignments of error related to the charge but hold that the charge was without prejudicial error.

We have considered each of respondent's assignments of error, and find them without merit. They are all overruled.

The respondent had a fair trial in his home county where a jury of his peers answered appropriate issues against him. The judgment of the Superior Court predicated thereon is Affirmed.

CAMPBELL and MORRIS, JJ., concur.

OPINION OF NORTH CAROLINA COURT OF APPEALS, No. 68SC93, Fall Session 1968, Filed 11-13-68.

Appeal by respondent from *Martin (Robert), S.J.*, October 1967 Session, JOHNSTON Superior Court.

The facts of this case are set out in *State Bar v Temple*, 2 N.C. App. 91. In apt time, respondent filed a petition to rehear. Because a motion of complainant suggesting a diminution of the record had not come to the attention of the Court, although properly filed and with proper notice to respondent, this Court granted the petition to rehear and directed oral arguments under Rule 44(e), Rules of Practice in the Court of Appeals of North Carolina.

ROBERT B. MORGAN and B. E. JAMES for complainant.

ELAM REAMUEL TEMPLE, Attorney *pro se*, and JOHN W. HINSDALE for respondent appellant.

MORRIS, J. Respondent's appeal in this matter was duly docketed and calendared for hearing on 12 June 1968. At that time the respondent did not appear to argue. The matter was calendared for rehearing on 23 October 1968. Again respondent did not appear to argue, nor did counsel who had signed his

brief appear to argue, although respondent's petition to rehear specifically requested that the Court direct oral arguments.

We have carefully examined the brief filed by respondent on rehearing and have reexamined the record. All assignments of error were considered and disposed of in the opinion of Britt, J., in *State Bar v. Temple*, 2 N.C. App. 91, and no useful purpose would be served by a second opinion discussing the assignments of error and reaching the same conclusion. We, therefore, deem it sufficient to say that each of respondent's assignments of error has been considered and found to be without merit.

Affirmed.

CAMPBELL and BRITT, JJ., concur.

ORDER OF THE SUPREME COURT OF NORTH CAROLINA ALLOWING MOTION TO DISMISS.

Motion to dismiss appeal is filed with the following order:
"Allowed by order of the court in conference this the 21st day of January 1969. Huskins, J., For the Court."

NOTICE OF APPEAL BY RESPONDENT TO SUPREME COURT OF NORTH CAROLINA.

Notice of appeal by respondent from MARTIN, Robert, S.J. October 1967 Session, Johnston Superior Court and Honorables BRITT, MORRIS and CAMPBELL, North Carolina Court of Appeals, Fall Session 1968:

That this appeal is taken pursuant to and under the provisions of Rules two and three of the Supplementary Rules of the Court of Appeals for North Carolina and pursuant to and under the Rules, (two and three) of the Supplementary Rules of the Supreme Court of North Carolina and North Carolina General Statute 7A-30.

JUDGMENT IN SUPERIOR COURT May 5, 1969

This cause came on before the undersigned Judge presiding at the March 31 Session, Superior Court of Johnston County, and was heard upon the motion of the respondent for a new trial on grounds of new evidence. At said hearing the respondent offered evidence which he contends constitutes newly discovered evidence.

At the time of the hearing on April 8, 1969, after hearing argument of counsel on the agreement of both parties, it was agreed that each side could have until April 12, 1969, to file additional affidavits, and that each side could have until April 16, 1969, to file memoranda of law or briefs in support of their position. It was further agreed, as appears in the record, that the undersigned could thereafter without further hearing on this matter render judgment out of term and out of the district.

On the evidence offered at the hearing and the briefs, and after argument of counsel, the court finds that the alleged newly discovered evidence fails to meet the requirements for the calendaring of a new trial, in that it is made to appear to the court that the evidence offered on behalf of the respondent involves witnesses who were subpoenaed at the original trial of this matter in October of 1967; and further that the alleged newly discovered evidence would tend only to be cumulative or tend only to discredit former witnesses; and that said evidence is not of such a nature as to show on another trial a different result would probably be reached.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that respondent's motion for a new trial on the grounds of newly discovered evidence be and the same is hereby denied.

This the 5th day of May, 1969.

HAMILTON H. HOBGOOD
Judge Presiding

JUDGMENT IN SUPERIOR COURT May 5, 1969

This cause coming on to be heard and being heard before the undersigned judge presiding at the March 31, 1969, Session of the Superior Court of Johnston County,

AND IT APPEARING To the court that:

I. The Honorable Robert M. Martin, Judge presiding at the October, 1967, Civil Session of the Superior Court of Johnston County, signed a judgment in the above entitled action as will appear in the record of this cause;

II. The respondent excepted said judgment and perfected an appeal to the Court of Appeals of North Carolina;

III. Upon the hearing of said appeal the Court of Appeals of North Carolina affirmed the judgment of the Superior Court;

IV. The respondent petitioned and was granted a rehearing before the Court of Appeals of North Carolina;

V. Upon the hearing of said rehearing the Court of Appeals of North Carolina affirmed its previous opinion and affirmed the judgment of the Superior Court;

VI. The respondent filed an appeal to the North Carolina Supreme Court, and said appeal was dismissed by the Supreme Court of North Carolina on January 21, 1969;

VII. Thereafter respondent filed a motion for a new trial on the grounds of new evidence in the Supreme Court of North Carolina, and the Supreme Court refused to take action;

VIII. Thereafter the Court of Appeals of North Carolina duly certified its opinion and judgment in this cause to the Clerk Superior Court of Johnston County, and same is now on file in said clerk's office, having been certified down on January 29, 1969.

AND IT FURTHER APPEARING TO THE COURT that when this matter came on to be heard at the March 31 Session of the Superior Court on April 8, 1969, both parties agreed that

judgment could be entered in this matter out of term and out of the district by the undersigned.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that in accordance with the opinion of the Court of Appeals of North Carolina, the said judgment of this court entered by the Honorable Robert M. Martin, Judge presiding at the October 1967 Session of this court be, and the same is hereby, affirmed for execution of sentence.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the disbarment from the practice of law of the respondent Elam Remuel Temple as provided in said judgment shall be in full force and effect from the date that the opinion of the Court of Appeals of North Carolina was certified to the office of the clerk of the Superior Court of Johnston County.

This the 5th day of May, 1969.

HAMILTON H. HOBGOOD
Judge Presiding

OPINION OF NORTH CAROLINA COURT OF APPEALS No. 6911SC489, Fall Session 1969, Filed 10-22-69.

Appeal from Hobgood, J., 31 March 1969 Session of Johnston County Superior Court.

This is an appeal by the respondent from an order and a judgment entered on 5 May 1969. The order denied respondent's motion for a new trial on the grounds of newly discovered evidence. The judgment affirmed a prior judgment disbarring respondent from the practice of law and ordered that judgment into effect from 29 January 1969, the date an opinion of this court affirming the judgment of disbarment was certified to the Clerk of Superior Court of Johnston County.

Robert B. Morgan for plaintiff appellee. E. R. Temple *in propria persona.*

GRAHAM, J. Judgment disbarring the respondent from the practice of law was entered 24 October 1967 after a jury had found him guilty of six separate acts of fraudulent and unprofessional conduct. The respondent's appeal was docketed and calendared but he did not appear in this court to argue. His appeal was nevertheless given thorough consideration and all assignments of error were disposed of in the opinion of Britt, J. State Bar v. Temple, 2 N.C. App. 91, 162 S.E. 2d 649. Thereafter the respondent petitioned for a rehearing, specifically requesting that oral arguments be directed. His petition was granted and the matter was duly docketed and calendared for hearing. Again the respondent did not appear to argue, nor did the attorney who signed his brief. The respondent's assignments of error were again found to be without merit. State Bar v. Temple, 3 N.C. App. 73, 164 S.E. 2d 13. On 3 December 1968 the respondent filed notice of appeal in the Supreme Court of North Carolina, alleging he was appealing as a matter of right. The appeal was dismissed by the Supreme Court on 21 January 1969. On 12 February 1969, the respondent filed a motion for a new trial in the Supreme Court on the grounds of newly discovered evidence. Upon being advised that the matter was not then pending in the Supreme Court, the respondent filed a similar motion in the Superior Court of Johnston County. The order denying that motion and the entering of a formal judgment of execution are the subject of this appeal.

The order and judgment appealed from are dated 5 May 1969. To properly effect this appeal it was necessary that the respondent docket the record on appeal in this court within ninety days after 5 May 1969. Rule 5, Rules of Practice in the Court of Appeals of North Carolina. The ninetieth day was on Sunday, 3 August 1969, so the respondent had through Monday, 4 August 1969, to docket the appeal. However, the appeal was not docketed in this court until 26 August 1969. No order appears in the record before us extending the time within which the appeal could be docketed and in accordance with the practice of this court and pursuant to Rule 48, Rules of Prac-

tice, *supra*, this appeal is dismissed *ex mero motu* for failure to docket within the time prescribed by Rule 5.

In dismissing this appeal we nevertheless note that the respondent's motion for a new trial was addressed to the sound discretion of the trial court. The decision of the trial court is not reviewable absent and abuse of discretion and no such abuse has been shown. State v. Morrov, 264 N.C. 77, 140 S.E. 2d 767; Allen v. Gooding, 174 N.C. 271, 93 S.E. 740. The defendant's motion and affidavits fall far short of establishing the necessary prerequisites for granting a new trail on the basis of newly discovered evidence. State v. Casey, 201 N.C. 620, 161 S.E. 81.

Appeal Dismissed.

CAMPBELL and PARKER, JJ., concur.

PETITION FOR CERTIORARI to review decision of the Court of Appeals is filed with the following Order:

"DENIED by order of the Court in Conference this the 2 day of December, 1969.

HUSKINS, J.
For the Court"

MOTION, NOTICE, REQUEST (Filed in Supreme Court 12-29-69).

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES (Filed 12-27-69).

Notice is hereby given that Elam Reamuel Temple, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment entered by the Supreme Court of North Carolina denying appellant petition for a writ of certiorari entered on the —— day of December, 1969, and judgments of N. C. Court of Appeals entered on the 14 August. 1968, and judgment entered October 1969, Judg-

ment November 13, 1968. The Clerk of the Supreme Court of North Carolina will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the following:

The record and statement of case on appeal in the Court of Appeals of N. C.
All judgments of the Court of Appeals for North Carolina in the cause.
All judgments of the Supreme Court of North Carolina entered in the cause.
The petition and answer for writ of certiorari filed in the Supreme Court of North Carolina.
The order denying the petition for writ of certiorari entered by the Supreme Court of North Carolina.

The following questions are presented by this appeal:

(a) That the Supreme Court of North Carolina erred by denying appellant a new trial in this cause on the grounds of newly discovered evidence.

(b) That the appellant has been tried and found guilty of certain issues without having been given reasonable opportunity to present evidence in his behalf.

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D. C.
October 8, 1964

TITLE 28 JUDICIAL ADMINISTRATION
CHAPTER I., Department of Justice
Order No. 324-64
Part 16 production or disclosure of material or information.

By virtue of the authority vested in me by the laws of the U. S. including section 161 of the Revised Statutes (5 U.S.C. 22) section 2 of Reorganization Plan No. 2 of 1950 (64 Stat. 1261) Part 16 of Title 28 of the Code of Federal Regulations is hereby amended to read as follows:

Sec. 16.1: "No officer or employee of the Department of Justice shall produce or disclose in response to subpoena, ordered or other demand (hereinafter in this part referred to as demand) of a court or other authority any information or material contained in the files of the Department of Justice or any other information or material acquired as a part of the performance of his official duties or because of his official status, without the prior approval of the Attorney General. For the purpose of this part, the term officer or employee of the Department of Justice, includes all officers and employees of the U. S. appointed by or subject to the supervision, jurisdiction or control of the Attorney General of the U. S., including U. S. Attorneys, U. S. Marshalls and members of the staff of those officials."

28 U.S.C.A. 1257 (1) (2) (3)

Final Judgments or decrees rendered by the highest Court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held, or authority exercised under the United States June 25, 1948.

AMENDMENT XIV Sec I portion which reads:

"Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny any person within its jurisdiction the equal protection of the law."

AMENDMENT V United States Constitution portion thereof which reads: "nor be deprived of life, liberty or property without due process of law."

AMENDMENT VI of United States Constitution portion

thereof which reads: In all criminal prosecutions the accused shall have the right to a speedy and public trial; TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR.

N.C.G.S. 84-28 (d) (f)

(D) Conduct involving willful deceit or fraud or any other unprofessional conduct.

(f) The violation of any of the canons of ethics which have been adopted and promulgated by the Counsel of the North Carolina State Bar.